STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Donald S. Owens, Stephen L. Borrello, and Cynthia Diane Stephens

POWER PLAY INTERNATIONAL, INC, and
GORDON HOWE,

Plaintiffs/Appellees,

v

DEL REDDY, AARON HOWARD,
MICHAEL REDDY and
IMMORTAL INVESTMENTS, L.L.C.,

Defendants/Appellants.

Supreme Court Case No. 154347

Lower Court Case No. 11-123508-CK

Court of Appeals Case No. 325805

STEVEN A. MATTA (P39718)
KELLIE M. BLAIR (P58642)
MATTA BLAIR, PLC
Attorneys for Plaintiffs/Appellees
39572 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304
(248) 593-6100/593-6116 Fax
smatta@mattablair.com
kblair@mattablair.com

BRUCE A. TRUEX (P26035)
ANTHONY A. RANDAZZO (P68602)
DREW W. BROADDUS (P64658)
SECREST WARDLE
Attorneys for Defendants/Appellants
2600 Troy Center Drive
P.O. Box 5025
Troy, MI 48007-5025
(248) 851-9500/538-1223 Fax
btruex@secrestwardle.com
arandazzo@secrestwardle.com
dbroaddus@secrestwardle.com

APPELLEES, POWER PLAY INTERNATIONAL, INC. AND GORDON HOWE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

STEVEN A. MATTA (P39718)
KELLIE M. BLAIR (P58642)
MATTA BLAIR, PLC
Attorneys for Plaintiffs/Appellees
Power Play International, Inc. and Gordon Howe
39572 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304
(248) 593-6100/593-6116 Fax
smatta@mattablair.com
kblair@mattablair.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES…….. ii-iii

COUNTER- STATEMENT OF APPELLATE JURISDICTION……. iv

DATE AND NATURE OF THE ORDER APPEALED FROM…….. v

RELIEF SOUGHT…… vi

COUNTER- STATEMENT OF QUESTIONS INVOLVED……..…… vii

COUNTER-STATEMENT OF FACTS…… 1

I. Introduction…….1

II. The 2007 Settlement Agreement…….5

III. Breach of the 2007 Settlement Agreement……..7

IV. The 2011 Case……..9

V. Trial…….17

COUNTER-STATEMENT OF STANDARD OF REVIEW…… 22

LEGAL ARGUMENT……22

I. In this breach of settlement agreement action which arose from the wrongful destruction of property by the Appellants-Defendants, Appellants-Defendants were not entitled to a new trial where Appellees-Plaintiffs' witness Howard Baldwin clearly provided testimony as a lay witness from his own experience producing a film about Gordie Howe.....22

II. Appellants-Defendants waived any argument on appeal that they intended to impeach Howard Baldwin, Appellees-Plaintiffs' witness by failing to make an offer of proof.....28

III. The trial court's order denying Appellants-Defendants' motion for directed verdict was correct where the Appellees-Plaintiffs' claims for attorneys fees and costs were submitted in a post-judgment motion pursuant to the terms of a settlement agreement that provided that attorney's fees and costs would be available to the prevailing party in any proceeding to enforce the agreement.....32

IV. This case is not appropriate for review by this Court…….....34

STATEMENT OF RELIEF SOUGHT……..……36

INDEX OF AUTHORITIES

Published Michigan Cases ***Page(s)***

Craig v Oakwood Hospital,
471 Mich 67, 85 (2004)……26

Eglash v Detroit Institute of Technology,
375 Mich 592 (1965)……29

Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co.,
274 Mich App 584, 589 (2007)……..……32, 33

Grand Rapid v H.R. Terryberry Co,
122 Mich app 750 (1983)……24

In re Howarth Estate,
108 Mich. App. 8, 12; 310 N.W.2d 255 (1981)……..33

Kelly v Builder Square, Inc.
465 Mich 29, 34 (2001)…….…..22

Mason v Chesapeke & O.R. Co,
110 Mich App 76 (1981)…….29

Muhhollan v DEC Int'l Corp,
432 Mich 395 (1989)……...25

Papo v Aglo Restaurants of San Jose, Inc.,
149 Mich App 285, 299 (1986)……..……..32

People v Cairnes,
460 Mich 750, 763-764 (1999)……27

People v Carnicom,
272 Mich App 614, 616-617 (2006)……..…...22

People v Crear,
242 Mich App 158, 167 (2000)……..……..22

People v Elston,
462 Mich 751, 766 (2000)……..……..27

People v Miller,
482 Mich 540, 561 n 26 (2008)……..…….22

People v O'Leary,
6 Mich App 115 (1967)…….29, 31

Pransky v Falcon Group, Inc.,
311 Mich App 164, 194, 195 (2015)……33

Reed v Reed,
265 Mich App 131, 164 (2005……..32

Zeeland Farm Servs v JBL Enters,
219 Mich App 190 (1996)……33

Court Rules

MCR 2.116(B)……..9

MCR 2.116(C)(8)……15

MCR 2.116(I)(2)……15

MCR 2.312 (D)(2)……..13

MCR 7.215(C)(1)……33

MCR 7.305(B)……34

Other Authorities

MRE 103……31

MRE 103(a)(2)……28

MRE 602……16, 25, 26

MRE 702……16, 25, 26

MRE 803(6)……...……14

COUNTER-STATEMENT OF APPELLATE JURISDICTION

Appellees Power Play International, Inc. and Gordon Howe concur in Appellants' statement of basis of jurisdiction and agree this Court has jurisdiction to entertain this application for leave to appeal, but deny Appellant has presented sufficient bases upon which to grant leave as required pursuant to MCR 7.305(B).

As set forth in the attached brief, the decision below was not clearly erroneous or an abuse of discretion, the issues involved in this case do not present a legal principal of major significance to the state's jurisprudence, and the decision below will not cause a material injustice.

DATE AND NATURE OF THE ORDER APPEALED FROM

Appellees concur that the Opinion of the Court of Appeals dated July 26, 2016 forms the basis of the application for leave to appeal and that the Opinion affirmed a September 25, 2014 judgment entered in favor of Appellee/Plaintiffs following a jury trial. Appellees deny there is any basis for review or reversal of the trial court, the jury verdict rendered, and/or the Opinion of the Court of Appeals. Defendants' claims in this application not only lack evidentiary support, they are unsupported by the existing case law and facts of this case.

RELIEF SOUGHT

Plaintiffs respectfully request this Supreme Court deny leave to appeal and/or to summarily affirm the decision of the Court of Appeals.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. In this breach of settlement agreement action which arose from the wrongful destruction of property by the Appellants-Defendants, were Appellants-Defendants entitled to a new trial where Appellees-Plaintiffs' witness Howard Baldwin clearly provided testimony as a lay witness from his own experience producing a film about Gordie Howe?

The Trial Court answered "no".
The Court of Appeals answered "no".
Plaintiffs-Appellees answer "no".
Defendants-Appellants answer "yes".

II. Did Appellants-Defendants waive any argument on appeal that they intended to impeach Howard Baldwin, Appellees-Plaintiffs' witness by failing to make an offer of proof?

The Trial Court answered "yes".
The Court of Appeals answered "yes".
Plaintiffs-Appellees answer "yes".
Defendants-Appellants answer "no".

III. Was the trial court's order denying Appellants-Defendants' motion for directed verdict correct where the Appellees-Plaintiffs' claims for attorneys fees and costs were submitted in a post-judgment motion pursuant to the terms of a settlement agreement that provided that attorney's fees and costs would be available to the prevailing party in any proceeding to enforce the agreement?

The Trial Court answered "yes".
The Court of Appeals answered "yes".
Plaintiffs-Appellees answer "yes".
Defendants-Appellants answer "yes".

IV. Is this case appropriate for review by this Court?

The Trial Court answered "no".
The Court of Appeals answered "no".
Plaintiffs-Appellees answer "no".
Defendants-Appellants answer "yes".

COUNTER-STATEMENT OF FACTS

I. Introduction

This matter arises from breach of a Settlement Agreement. Plaintiff/Appellee Gordon "Gordie" Howe (Howe) is the renowned Hall of Fame hockey legend whose appearance, image, autograph, trademarks, copyrights, memorabilia, career and life are marketed and managed by Power Play International, Inc. (PPI), a company owned by Howe and his family[1]. Defendants D. Reddy and A. Howard were employed by PPI for eight years as managers. Defendants M. Reddy and Immortal Investments, M. Reddy's company, published books utilizing Howe's image and property.

Defendants' have characterized their relationship with the Howes as "like family." Unless the Defendants' consider their family dynamic akin to the betrayal in Shakespeare's *Hamlet*, this characterization couldn't be further from the truth.

After years of clandestinely embezzling memorabilia and secretly profiting from Howe appearances and the use of his autographs and image, Defendants D. Reddy and A. Howard vindictively destroyed all 3 of PPI's computer hard drives, removed memorabilia and company records from PPI offices, and quit without any notice, leaving one piece of paper on a desk in the office. The Howe family scrambled to determine what happened, identify contractual obligations and appointments, and to pick up the pieces of the shattered business. In 2007, Plaintiffs sued the Defendants in an 11 count suit seeking to get back what had been stolen from them, prevent the Defendants from profiting from their horrendous conduct, and to obtain damages for the vicious harm they caused.

[1] Mr. Howe passed away the day after the Court of Appeals decision was rendered. In accordance with MCR 2.202(1)(a), a motion is being filed in the trial court to substitute the personal representative of Mr. Howe's estate for Mr. Howe.

In November 2008, the lawsuit was resolved against the Defendants for monetary damages and injunctive relief against misappropriation of Howe's name, image and other intellectual and personal property, *including return of personal property belonging to PPI and Howe*[2]. The settlement agreement entered into by the parties required Defendants to deliver to PPI and Howe any and all "physical property" in their possession/control[3] that in any way related to PPI, Howe or his family. Unfortunately, Defendants maliciously breached the agreement by not only failing to return the property, but by *vindictively* destroying it[4] and thereby preventing PPI and Howe from recovering valuable documentation for its business as well as irreplaceable footage, photographs and other materials that documented the career and family life of Gordie Howe. The underlying suit followed.

Defendants had repeatedly denied having possession of any property belonging to PPI and Howe throughout the 2007 case, but boldly and brazenly admitted in deposition that they had "wiped hard drives" and destroyed computers when they quit. Therefore, in addition to providing that Defendants were required to *deliver* to PPI and Howe every item of "physical property" they possessed relating to Howe or his family, the settlement agreement also provided for injunctive relief that stopped Defendants from using Howes' intellectual property in any way, shape or form. The agreement specifically prohibited use of the intellectual property on Defendants' computers, websites, advertisements, publications, and digital media. The deal was simple – Defendants were to return absolutely every item of "physical property" relating to the Howes and PPI *without exception*, including all CDs, DVDs, videotapes, and papers of any kind and they were required

[2] In their application, the Defendants spend significant time recounting the issues concerning their argument that they had the "right" to destroy the property, but that is not an issue they have raised in their application.
[3] Defendants were also required to make their best efforts to search and locate any property in the possession of anyone else and have it delivered to Plaintiffs.
[4] Del Reddy admitted during trial in this case the property was destroyed in part to be vindictive against Mark Howe.

to come to Court and testify under oath that they had complied, and further testify that they had erased any digital or electronic sources from which a copy could be made by them [such as those sources existing on Defendants' computers and website] or turn that source over to Plaintiffs. *It was clear that Plaintiff bargained for and intended to have all physical property delivered to it in the deal, particularly the CDs, video tapes, digital images, and other specifically itemized materials.*

Despite Defendants' protestations and defenses of innocence throughout the 2007 litigation, they ultimately delivered a sixteen foot moving truck and two passenger vans full of PPI's and Howe's property. PPI and Howe, while stunned by the sheer amount of property that had been concealed and misappropriated by Defendants, were relieved the matter was finally coming to an end with the return of all Plaintiffs' property. However, at the same time Defendants delivered the property to Plaintiffs, they also handed to Plaintiffs' counsel, without explanation, two invoices from a company called Shred It. Plaintiffs subsequently learned Defendants had made two separate trips to Shred It to have property destroyed, in direct breach of the settlement agreement. On Defendants' first trip, Shred It destroyed 8 bankers' boxes of 402 compact discs, 861 tapes and 17 bankers' boxes full of paper. On the second trip, Shred It destroyed 9 bankers' boxes full of paper, 3 bankers' boxes full of 134 DVD's and 528 tapes. Although these acts of maliciousness were consistent with Defendants' previous actions of destroying hard drives and computers belonging to PPI and Howe, they were nonetheless stunning and surprising after all the parties had gone through to reach a resolution of the 2007 case.

All Defendants' had to do was deliver all "physical property" relating to the Howes and PPI and stop using Plaintiffs' intellectual property. It was that simple. Instead, Defendants destroyed property they were required to deliver, depriving Plaintiffs of their bargained for

consideration. The settlement agreement provisions are clear: Paragraph 3b required all physical property be delivered to Plaintiffs and paragraph 3c obligated Defendants to state under oath before the trial court they had complied with 3b by delivering all items, including CDs, tapes, documents and all digital and electronic media containing images of the Howe family, and the provisions of paragraph 4 regarding the injunction by retaining nothing in their possession, and testify that all *sources* of digital or electronic copies were permanently erased or delivered to Plaintiffs, thus confirming that Plaintiff's intellectual property was no longer contained on Defendants' websites, digital advertisements or other non-physical media.

Defendants' breach of the settlement agreement resulted in Plaintiffs' filing the instant case for breach of contract. After a jury trial, Plaintiffs were awarded $3 million dollars for the damages sustained by Defendants' admittedly vindictive acts. Defendants appealed the verdict and the Court of Appeals affirmed. Defendants' raise three issues in this application and have abandoned the remaining issues that were affirmed by the Court of Appeals. The application should be denied for the following reasons: 1) there was no error in the admission of Mr. Baldwin's testimony as a lay witness, and alternatively if there was error it was harmless error as Mr. Baldwin was qualified to give expert testimony as to the costs of film production; 2) Defendants failed to make any offer of proof and therefore any alleged error and impediment to impeachment has been waived; 2) Plaintiffs were not required to submit evidence of attorneys' fees in their case in chief as the settlement agreement clearly provides the prevailing party was entitled to attorneys fees and costs and thus Plaintiffs could not prove fee until they prevailed.

II. The 2007 Settlement Agreement

On November 3, 2008 Plaintiffs and Defendants settled the 11 count complaint that Plaintiffs filed in 2007 seeking, among other things, return of Plaintiffs' property and injunctive

relief for the misappropriation of Plaintiffs' physical and intellectual property. The terms of the settlement were placed on the record before the Honorable Steven Andrews[5] on November 10, 2008 in open court and subsequently settlement documents were executed by the parties.

The settlement agreement recited the consideration and obligations of the parties at paragraphs 2 and 3, listing a multitude of items that Defendants were required to deliver to Plaintiffs, which included any and all "physical property" relating or pertaining to Plaintiffs or the Howe family. Paragraph 4 of the agreement was a permanent injunction enjoining the Defendants from possessing, using, selling or in any way profiting from the Plaintiffs' name, image or other intellectual property. The agreement provided:

> 3b. To *deliver* to Plaintiffs' attorneys, no later than November 24, 2008 at 4:00 p.m, at a location designated by Plaintiffs and/or their attorneys, all of the following: (i) all remaining inventory of the book entitled *Mr. & Mrs. Hockey, A Tribute to the Sports Greatest Couple* (Tribute Book), in the approximate amount of 2100 such books, plus 600 proofs of such books, and all dust jackets and inserts; (ii) Any and all original and copies of digital images, photographs (framed and unframed), and negatives, for all photos and images depicting any member of the Plaintiff Gordon Howe's family, including but not limited to Gordon Howe, Colleen Howe, Mark Howe and Marty Howe (Howe Family), and including so-called *Kings of Their Sports* photographs (Kings Photos), whether signed or unsigned, personalized or not, physical, electronic or digital, or in any other format; (iii) Any and all originals and copies of videotapes, including all copies of the deposition of Plaintiff Gordon Howe and the deposition of Companion Case Defendant, the deposition of Marty Howe, and originals and copies of and any and all films, CD's, and other analog, electronic, or digital media depicting any image of Plaintiffs and/or members of the Howe Family; (iv) Any and all personal property depicting, relating, or in any way pertaining to Plaintiffs and/or any member of the Howe Family, signed or unsigned, personalized or not, including, but not limited to, hockey pucks, hockey sticks, hockey jerseys, equipment, bobble heads, books, hockey cards, tickets, jackets, flats, artwork, signs, programs, newspaper articles, posters, autographs, or any other item of physical property (Memorabilia); (v) Defendants shall each use best efforts, in good faith, to search for such Memorabilia and other items required for compliance with the paragraph 3b, including locating and obtaining such Memorabilia and other items which may be

[5] Judge Andrews retired and this matter was reassigned to Judge Leo Bowman.

> in the possession or control of Defendants' family, friends, business associates, patrons or other persons or entities, and Defendants hereby represent and warrant that they shall not retain any memorabilia or other items required for satisfaction of this paragraph 3b, whether in their possession or the possession of others on their behalf.

Paragraph 3c, cited erroneously by Defendants for their proposition that they could choose whether they could erase or turn over to Plaintiffs "sources of digital or electronic copies" was in reality an obligation that required the Defendants to appear in court on November 10, 2008 and state under oath that they had or would comply with the requirements of the preceding sections (section 3b) and that they had retained nothing relating to Plaintiffs in their possession:

> 3c. The Defendants shall appear on Monday December 10, 2008 before Judge Andrews in the Oakland County Circuit Court at 1:30 p.m. and shall state on the record in open court, under oath, that they have or will timely and fully comply with the requirements of this Agreement, in particular but not limited to those set forth in 3.b (i)-(v), they shall retain nothing in their possession which in any way depicts, relates, or in any way pertains to the Howe Family including and [sic] originals or copies, digital, electronic or analog, and all sources of digital or electronic copies shall be permanently erased or turned over to Plaintiffs…

The Defendants appeared on November 24, 2008 with a 16 foot moving truck and 2 passenger vans filled with PPI's and Howe's property that included, among other things, 150 framed photographs relating to the Howes, 41 hockey sticks, 30 boxes of miscellaneous items, including some CDs, 6 boxes of bobbleheads and other items listed on the attached inventory list submitted by Defendants[6].

III. Breach of the 2007 Settlement Agreement

During the delivery and while Plaintiffs were inventorying this stunning amount of material, and laboring under the Defendants' now frivolous contention that they had returned all

[6] Defendants repeatedly denied having any memorabilia or other property of PPI and Howe throughout the 2007 case.

physical property that belonged to PPI and Howe, Defendant Mike Reddy handed over, without explanation, two Shred-It invoices. Plaintiffs later learned that these invoices evidenced Defendants' destruction of PPI's and Howe's property by Shred-It without any prior notice to PPI or Howe. PPI and Howe subsequently learned, upon contact with Shred-It, that the following property had been destroyed on two separate occasions: November 20, 2008 – 8 banker's boxes full of 402 compact discs, 861 tapes and 17 banker's boxes full of paper; and November 22, 2008 – 9 banker's boxes full of paper, 3 banker's boxes full of 134 DVD's, and 528 tapes.

After being presented with the Shred It invoices which established that documents, compact discs, DVDs and tapes were destroyed rather than returned to Plaintiffs, PPI and Howe moved for entry of a consent judgment for liquidated damages in the amount of $60,000.00 against Defendants for their violation of the settlement agreement. The trial court granted that consent judgment. Defendants sought an interlocutory appeal with the Court of Appeals, which was granted. (Ex. 1). That opinion and order dated September 22, 2011 at Page 1, stated:

> "There is no dispute that the items were associated with Gordie Howe, nor is there a dispute that the items were destroyed; rather, defendants contend that the destruction was consistent with the settlement agreement, whereas plaintiffs maintained that the destruction constituted a violation of the settlement agreement."

The Court of Appeals also stated in its opinion and order:

> "The trial court also found, however, that defendants had breached the terms of the settlement agreement, and it ordered a hearing to establish the amount of damages to be awarded."

(Ex. 1, p. 2). This Court ultimately reviewed whether the consent judgment was a remedy available only upon violation of the permanent injunction provision of the Settlement Agreement, or was available as a remedy for other breaches of the agreement. The Court of Appeals held a consent judgment could not issue without a violation of the injunction provision, but further stated:

> "Plaintiffs are free to pursue a claim for breach of the settlement agreement, but to do so they must file a separate breach of contract action, not a motion for entry of consent judgment."

(Ex. 1, p. 3).

Thus, the Court of Appeals' opinion and order did not vacate the June 3, 2010 order or otherwise reverse the trial court's findings that Defendants had, in fact, breached the settlement agreement by destroying items associated with Gordie Howe as evidenced by the two Shred-It invoices and the affidavit of the employee of Shred-It. Rather, this court held the proper remedy for a breach of the settlement agreement was not entry of a consent judgment, but the filing of a new lawsuit for breach of the agreement. Plaintiffs filed this action in 2011 for breach of that agreement, resulting in the underlying trial court verdict and subsequent appeal from which this application arises.

IV. The 2011 Case

PPI and Howe filed their complaint in the instant case for breach of the settlement agreement and moved for an immediate motion for summary disposition as to liability. (Exs. 2 and 3). PPI and Howe asserted in their motion for summary disposition that there was no genuine issue of material fact that Defendants had breached the settlement agreement by failing to deliver the items to Plaintiff and instead destroying them.[7]

In support of their motion, PPI and Howe attached the settlement agreement, the inventory showing what was returned to Plaintiffs by Defendants, two invoices from Shred-It and an affidavit

[7] Defendants' characterize the Plaintiffs' motion for summary disposition as "an unusual procedural maneuver." See Appellants' Application for Leave, p. 1 fn. 5. In fact, a motion for summary disposition by the plaintiff is not unusual at all, especially in commercial litigation matters. The court rule governing such motions, MCR 2.116, provides that a party may move for a judgment and that a motion by a party "asserting" a claim must give 28 days notice of the hearing on the motion instead of 21 days required of a party defending a claim (MCR 2.116 (B).

of a Shred It employee attesting to the type and number of items destroyed. Paragraph 3b of the settlement agreement required the following property be delivered to PPI and Howe:

> ii) "any and all original and copies of digital images, photographs (framed and unframed) and negatives...physical, electronic or digital, or in any other format";
> iii) "any and all originals and copies of videotapes...films, CDs, and other analog, electronic or digital media depicting any image of Plaintiffs and/or members of the Howe family";
> iv) "any and all personal property depicting relating, or in any way pertaining to Plaintiffs and/or any member of the Howe family…or any other item of physical property" [emphasis added]

The items Defendants chose to destroy included CD's, tapes, DVD's and documents, all items that were defined in paragraph 3b as "physical property" to be delivered to Plaintiffs on or before November 24, 2008. Defendants were even obligated to search and locate all of the above items that may have been in possession of others, so as to ensure they did not give items to anyone to hold and retain on their behalf.

Defendants' contended, and still contend in their factual recitation in this application, that they destroyed "their own personal belongings"[8] an argument directly contrary to the Court of Appeal's opinion and order dated September 11, 2011, which stated there was no dispute the materials related to Howe or that Defendants' destroyed those materials. In fact, the contention is nonsensical - why would Defendants destroy so many items and prove it to Plaintiffs if they didn't relate to Plaintiffs and there was no obligation to do so?[9] The Shred It invoices substantiate the type of materials destroyed were those specifically identified in the agreement to be delivered to Plaintiffs. It makes no sense that Defendants destroyed the property, incurred the cost to do so and

[8] See Defendants' application, p. 2

[9] Defendant M. Reddy later filed an affidavit in the lawsuit in which he admitted that he destroyed the property because it "may have possibly depicted the Howe family members in family social settings" and rather than turn over the physical property as he was required to do, he destroyed it. While Plaintiffs certainly don't believe that his interpretation of the settlement agreement was merely erroneous, but was calculated and intentional, for purposes of the pretrial motions and at trial it was clear that Defendants had no right to destroy this property. (See Appellees' Brief on Appeal, p. 24-25).

later provided invoices as proof of the destruction of that property to PPI and Howe, if it didn't relate to Plaintiffs. Furthermore, Defendants simultaneously contend that the property didn't relate to the Plaintiffs *and* the items that were destroyed were done so in compliance with the settlement agreement. These two positions are contradictory and untenable as there was no obligation to destroy or deliver property that did not relate to Plaintiffs.

The trial court and the Court of Appeals ultimately agreed with PPI's and Howe's straightforward interpretation of Paragraph 3b of the settlement agreement as being unambiguous and that the property identified within Paragraph 3b and the Shred It invoices should have been delivered to PPI and Howe. There is no dispute the property that was destroyed, DVDs, CDs, tapes and papers pertaining to Gordie Howe and his family, all fell within the definition of the items to be delivered to PPI and Howe pursuant to 3b of the settlement agreement. There was also no question of fact that the documents and other items could have been delivered because the Defendants were able to deliver them to Shred-It and have them destroyed. Thus, it was always within the potential and ability of Defendants to actually deliver this property to PPI and Howe in accordance with the settlement agreement.

The trial court and the Court of Appeals rejected Defendants' argument that they "permanently erased" their own personal property in compliance with paragraph 3c. However, paragraph 3c stated only that Defendants must state under oath that they retained nothing in their possession, had complied with the provisions of 3b and 4 and had permanently erased or delivered to the Plaintiffs the "sources of digital or electronic copies." In other words, as Defendants had been using Howe's name and image on Defendants' website and computers to sell merchandise, they were to erase any reference of these "sources" from that website and/or computer. By contrast, any physical copy of that digital image would have to be delivered to Plaintiffs, and CDs,

videotapes, and "other digital or electronic media" were specifically itemized in 3b as required to be delivered. Collectively, these provisions were to ensure that Defendants did not retain or use anything, physical or existing in cyber space, related to the Howes, even on their computers or websites, while ensuring that whatever images they had generated in physical form would be delivered to Plaintiffs. Provision 3c in the settlement agreement did not negate, modify, or alter the duty of Defendants to deliver to PPI and Howe all physical property. It just required them to testify in open court about their compliance with 3b.

Paragraph 3b specifically itemized the property to include CDs, videotapes, and all other digital or electronic media of any kind. It also contained a catch all at 3b (iv) that stated "any other item of physical property" was to be delivered. Nothing was allowed to be retained, and they had to testify that they had erased or turned over the "sources of digital or electronic copies." Paragraph 3c required Defendants to state under oath that they had complied with the agreement by delivering all property in accordance with 3b and they had not retained any intellectual property that otherwise could not physically be returned to PPI and Howe.

In an attempt to give meaning to their absurd interpretation of Paragraph 3b, Defendants argued in the trial court, and now in their applicatin before this Court, that Defendants "permanently erased" their own personal property. Both the trial court and the Court of Appeals rejected these arguments, as section 3b required delivery of all physical property to Plaintiffs, and specifically itemized and referenced the very items Defendants destroyed. Even by their own twisted interpretation, Defendants did not comply with Paragraph 3c regarding permanent erasure. In fact, Defendants fully admit that they shredded the materials, completely destroying them - they did not *erase* them.

Defendants also contended that PPI and Howe could not establish knowledge concerning the content of the materials allegedly destroyed and they relied upon a request to admit they had cited *from the 2007 case, not the 2011 case*[10] and they again raise this factual misstatement in their application. Despite the fact that Defendants' could not rely upon this request in the underlying case pursuant to MCR 2.312 (D)(2), the Plaintiffs responded by stating the content of the items related to Howe and his appearances, business records and family. The answer was clearly premised upon Mark Howe's knowledge that Defendants had destroyed CDs, tapes, and documents, but Plaintiffs had not received these items from Defendants in accordance with the settlement agreement. Defendants' improper destruction of the property in contravention of the settlement agreement deprived PPI and Howe any opportunity to examine the content or otherwise review the materials prior to the destruction. It was and continues to be remarkably audacious that Defendants continue to assert factually that PPI and Howe were required to produce evidence of the actual images Defendants destroyed in contravention of the settlement agreement when, in fact, the Defendants intentionally destroyed the evidence of that content of their own volition without first showing it to PPI and Howe, or obtaining any kind of release or approval. Furthermore, the whole 2007 litigation was premised upon Defendants' improper misappropriation of Plaintiffs' property which Defendants had complete control over for many years due to their employment as managers for PPI.

Defendants further assert in their factual recitation that the affidavit of Aaron Frezza, filed in support of Plaintiffs' motion for summary disposition, was insufficient for the trial court to

[10] Defendants failed to raise this critical distinction in the trial court, the Court of Appeals and this application. They also simply ignore the fact that they destroyed the documents and other materials they had converted from Plaintiffs before any inventory by Plaintiffs. While the issue of the interpretation of the settlement agreement is not an issue in this application, it is necessary to show the continued inaccuracies of Defendants' statements in the lower court proceedings and these proceedings.

consider as Mr. Frezza had no personal knowledge of the content of the materials that were destroyed. However, Defendants completely ignore the fact that the motion for summary disposition by Plaintiffs (Ex. 3) sought an interpretation which was clear and unambiguous in the settlement agreement that all physical property was to be returned to PPI and Howe- and that Defendants' breached the agreement by failing to return those items. Thus, the affidavit by Aaron Frezza established that the *type* of property destroyed were physical items subject to be delivered by Defendants in accordance with the agreement. The fact that Aaron Frezza didn't review or know exactly what was on the material destroyed is of no consequence. His affidavit was admissible pursuant to MRE 803(6) to show that property was destroyed. The Court of Appeals correctly determined:

> "viewing the evidence in a light most favorable to defendants, there is no genuine issue of material [fact] that defendants destroyed property in violation of the settlement agreement. Defendants do not contest that they destroyed the times listed on the invoices, which included CDs, DVDs, and tapes. As discussed earlier, defendants were required to turn over these types of items to plaintiffs."

(Ex. 4, p.5). The trial court concluded that the Defendants breached the settlement agreement and granted partial summary disposition as to liability only for PPI and Howe as there was no factual dispute that Defendants were required to deliver the property to Plaintiffs and, instead, they had delivered it to Shred It for destruction. The trial court held:

> "Specifically, this court finds that destroying items (i.e., shredding items) and failing to turn them over to Plaintiff constituted a breach of the settlement agreement."

(Ex. 5).

The trial court further went on to reject Defendants' arguments and deny any claim for summary disposition pursuant to I(2) made by Defendants and premised upon the argument that

PPI and Howe could not prove damages because Defendants' had asserted they destroyed their own property and it had no monetary value[11].

Defendants then brought another motion for summary disposition on want of damages. While they assert that while they brought this motion based upon discovery responses, which they argued confirmed that proofs regarding damages were based upon speculation and conjecture, the trial court concluded the motion was a rehash of arguments already made, i.e. they were relying upon discovery requests in the previous case. (Ex. 6, p. 9, 11).

As PPI and Howe pointed out to the trial court, not only was Defendants' motion premised upon answers to request for admission submitted in previous 2007 case, which was objected to by Plaintiffs, but the answer provided "the content had to do with Gordon Howe, his family, appearances as well as business records." PPI and Howe attached the affidavit of Mark Howe who unequivocally testified that Defendants Del Reddy and Aaron Reddy systematically and continuously filmed Gordon Howe and Howe family members during their employment and prior to November, 2007, yet no such films or audiotapes were ever returned to the Plaintiffs. (Ex. 7). PPI and Howe also submitted an affidavit of Howard Baldwin indicating that Mr. Baldwin would testify he was interested in obtaining for value all personal items relating to the Howe family to include in a movie that he was producing. (Ex. 8). His testimony established that those items depicting the Howes, had they been available, would have enhanced the value of the movie and resulted in consideration of more than six figures.

The trial court correctly denied Defendants' renewed motion for summary disposition and in doing so held that Plaintiffs' complaint sufficiently stated a breach of contract pursuant to MCR 2.116(C)(8) (Ex. 5) and that Defendants were merely seeking reconsideration of the April 2012

[11] The trial court noted the Defendants had failed to contact the court to schedule a cross motion in accordance with its order and thus was considering the motion pursuant to MCR 2.116(I)(2).

opinion and order by the trial court which determined Defendants had breached the settlement agreement and stated the matter would proceed to trial on the issue of damages only. The trial court correctly noted that the issue of damages was a question of fact to be determined at trial.

Next and related to their argument on appeal, Defendants brought a motion to exclude the testimony of Howard Baldwin, Plaintiffs' witness (Ex. 10). Defendants contended that Howard Baldwin was not qualified as an expert pursuant to MRE 702, lacked foundation as a lay witness, there were no facts in evidence to support any opinion on damages. Plaintiffs filed a response to the motion and argued that 1) Mr. Baldwin was a lay witness who could provide testimony pursuant to MRE 602 as Mr. Baldwin was the individual who produced the movie and negotiated the life rights for use of all depictions of the Howe family and/or Gordon Howe, 2) that he was deprived of that footage due to defendants' destruction of the material; 3) that he personally would have paid the Howe family for that material; 4) that alternatively, Mr. Baldwin could be qualified as an expert if his testimony was not otherwise lay testimony because his testimony was based upon sufficient facts and/or data, was the product of reliable principles and methods and the witness applied those principles and methods reliably to the facts of the case. (Ex. 11, p. 6-8).

PPI and Howe submitted sufficient evidence that Mr. Baldwin was an executive producer of numerous movies, which included *Ray* starring Jamie Foxx, and *Games of Their Lives*, a fictional depiction of a soccer team (Exs. 8 and 17). Mr. Baldwin's testimony was based upon a negotiated deal that he did with PPI and Howe through the Defendants themselves prior to the litigation, which ultimately fell through and a current movie he was making about Gordie Howe (Exs. 8 and 17). His testimony was based upon the fact that he would have purchased home movies and/or rights to use those movies and other depictions of Gordie Howe and the Howe family and he would have paid more value for that property if it had been available to him. The testimony

was based upon his years of experience as an executive movie producer and what he would have paid in this deal given the facts of this case (Ex. 8). Thus, the trial court had more than sufficient basis to deny Defendants' motion in limine (which Defendants' renewed immediately before trial in an untimely, ambush attempt rejected by the trial court). As will be explained further below, the testimony given by Mr. Baldwin was ultimately lay testimony and Defendants' attempts to characterize it otherwise is a misapplication of the facts.

V. Trial

The matter ultimately proceeded to trial on the issue of damages only beginning in June of 2013. At trial, the only witnesses called by Defendants were the Defendants themselves. They did not call any expert witnesses. At trial, for Plaintiffs, Mr. Baldwin and Marty Howe both testified to the value of Gordie Howe's intellectual property based upon their own experiences buying and selling those images, signatures and materials that would contain that intellectual property. Furthermore, the Defendant Del Reddy himself admitted that Gordie Howe's autograph was worth $100.00 - $300.00 depending on what was signed. (Ex. 13, TT. Vol. II, p. 139). Defendants also admitted to using photographs of Howe and his family in a book they sold for $50 each, and the bulk of that value was the photographs included in the book. Trial testimony also proved conclusively that Defendants Del Reddy and Aaron Howard systematically and continuously filmed Gordie Howe and the Howe family members during their employment with PPI. The proofs were uncontroverted that no films, audiotapes, DVDs or discs of the vast amounts created through 8 years of systematic and regular photographing and videotaping were ever returned to PPI or Howe as required by the settlement agreement, but that 1389 tapes, 402 CDs and 134 DVDs were in fact destroyed by Defendants. Another witness for Plaintiffs, Felix Gatt, testified to the systematic photographing and videotaping of the Howe family by Defendants. (Ex.

14, TT, Vol. VI, pp. 96-105). The testimony included several firsthand accounts of seeing Defendants take photographs and videos of Gordie Howe at NHL hockey games, at a speech by Gordie Howe in Grosse Pointe, at appearances at Hall of Fame events and numerous other occasions when Defendants were in fact capturing images of Gordie Howe and his family. It was also testified to that none of that material was ever returned to Plaintiffs pursuant to the settlement agreement. Del Reddy and Aaron Howard admitted at trial to having taking photographs and videos as well and vindictively destroying them. (Ex. 15, TT. Vol. II, pp. 146-153; Ex. 16, Vol. III, pp. 25, 82-91). Specifically, D. Reddy testified:

> Q. So is it true, sir, that when you destroyed those hard drives, and later destroyed these records, and the films and the photos, you did that because you were being vindictive towards Mark Howe?
>
> A. Partially, yes.

(Ex. 16, TT. Vol. III, pp. 25).

With regard to the testimony of Howard Baldwin, the trial court required PPI and Howe's counsel to lay a proper foundation for his testimony. (Ex. 17, TT. Vol VII, pp. 47-87). Mr. Baldwin testified extensively that given the Defendants' admissions and frequency and amount they had videotaped Gordie Howe and his family, this footage taken by Defendants was significant and important for him as a filmmaker in making the film regarding Gordie Howe that ultimately aired on the Hallmark channel. He also testified this was material that he sought and negotiated for with Del Reddy directly. Mr. Baldwin's testimony was unequivocal that whether any photographs could be used in the film itself is irrelevant to the value as the material had significant value to all aspects of the filmmaking process, including lighting, set design, décor, recreating as closely as possible the rooms and settings in which Mr. Howe and his family lived or recreated, actors using the footage to obtain the closest likeness to various mannerisms in the characters they

portrayed and innumerable other uses as recounted by Mr. Baldwin. (Ex. 17, TT. Vol VII, pp. 39-85). Thus, any notion that Mr. Baldwin speculated is refuted by his concrete testimony as to past experience producing an Academy Award winning film and several other major movie productions, including the current movie of Howe, which his testimony was unequivocal that he would have paid $500,000 to a $1 million dollars for a minute and one half of footage!

Testimony establishing damages was given as follows: 1) Del Reddy testified that photographs of Gordie Howe with other sports figures sold anywhere from $300 to $1000 per photograph; (Ex. 18, TT. Vol. II-191; Ex. 14, Vol. VI, p. 27); Marty Howe testified that routine photographs of Gordie Howe sold for $100 per photo (Ex. 14, TT, Vol. VI, 29, 31, 40); Marty Howe testified that one premium photograph could be released in limited editions of 1000 which would sell for an average of $500 per photograph, which totaled $500,000 in damages (Ex. 14, TT. Vol. VI, 27, 34-37); Aaron Howard admitted CDs in their possession, which they destroyed had a memory 700 megabytes (Ex. 16, TT. Vol. III, 126); Witness Gatt testified digital photos are typically 2 ½ to 5 megabytes in size (Ex. 14, TT. Vol. VI, 106)[12]; Howard Baldwin testified he paid $75,000 for 1 ½ minutes of video of Gordie Howe he used in the film of Howe but that the value was actually higher as he used a "friends and family discount" (Ex. 17, TT. Vol. VII, 58, 87, 91, 100); Howard Baldwin testified he would have reasonably paid $500,000 to $1 million dollars for footage for his own use (Ex. 17, TT Vol. VII, 52-87); Mark Howe testified it took PPI 1.5-2 years to recreate business documents and contracts for appearances due to destruction of documents estimating it cost them $240,000[13] per year for a total for a total of $480,000 (Ex. 19, TT Vol. V, 71).

[12] Thus, doing the math on the disc size there were a potential of 140 photos per CD x 402 CDS=56,280 photos destroyed, aside from any still that could be generated from DVDS.
[13] D. Reddy and A. Howard were paid a total yearly compensation of $240,000.

Thus Defendants' assertion in their application that any verdict was based solely on Mr. Baldwin's testimony, or that his testimony was entirely based upon a dispute between Kobe Bryant and Bryant's mother is entirely belied by the trial transcripts and the ample evidence of damage testimony given by a plethora of witnesses, including Mr. Baldwin, who had direct experience buying and selling the intellectual property of Mr. Howe. Any allegation that the damages were speculative, unproven or based upon inadmissible expert testimony is simply false. The testimony given (and not just by Mr. Baldwin) was evidence of what was paid in the past for images and films of Mr. Howe, what would be paid or would have been paid for the current movie for such images/film and losses as to PPI regarding the documents concerning the business.

Defendants assert that they were prevented from impeaching Mr. Baldwin with prior sworn testimony at trial. However, there is nothing in the record to reflect this whatsoever. While Defendants' counsel has submitted an affidavit in support of their appeal that states counsel "intended to impeach Howard Baldwin's testimony" the trial record shows that he never attempted to do any such thing. Contrary to Defendants' assertion, the trial court did not make any statement, ruling or otherwise at sidebar or any other time that concerned any deposition other than the May 20, 2013 de bene esse deposition, which had been stricken from the record.[14] And despite counsel's affidavit, Defendants never attempted to preserve the record by making any offer of proof, which was absolutely essential and necessary to preserve their argument on appeal regarding this issue.

[14] The deposition was stricken from the record upon request *by Defendants' counsel*. At trial, PPI and Howe and Defendants had failed to agree on the objections and purge the de bene esse deposition of Howard Baldwin. The trial court ruled that as a result of this failure to purge the de benne esse deposition, it was stricken and that Mr. Baldwin had to be presented live by the afternoon. Plaintiffs presented Mr. Baldwin live from Los Angles via Skype in accordance with the trial court's ruling.

Both Plaintiffs and Defendants had asserted breach of contract claims in this action. Defendants' claim was based upon their argument they were prevailing party and were entitled to attorneys fees and costs pursuant to the settlement agreement. Plaintiffs also asserted its right to that claim in its complaint. Despite Defendants' arguments on appeal, Defendants never introduced, nor sought to introduce, any evidence of the reasonableness of their attorneys fees and costs in the trial court in support of their counter-complaint. Even they believed that the matter was to be handled by a post judgment motion, as evidenced by their failure to submit any proofs, or make an offer of proof on their counterclaim at trial. Defendants' claim that they are entitled to a directed verdict on the issue of attorneys fees and costs is disingenuous and, as evidenced by the agreement itself and the corresponding case law, simply wrong. Thus, the post-judgment motions brought for an award of attorneys fees and costs in light of the settlement agreement's provision that "The prevailing party in any proceeding to enforce this agreement, or any remedy contemplated by this Agreement, shall be entitled to recover, in addition to any other remedy, actual costs and attorney fees incurred in the enforcement" was the correct application of the law.

COUNTER-STATEMENT OF STANDARD OF REVIEW

Appellees-Plaintiffs disagree with Appellants-Defendants' statements regarding the application itself and are more fully articulated in argument IV.

As to the standard of review for the decision in the lower courts, review of a motion for new trial is an abuse of discretion. *People v Crear*, 242 Mich App 158, 167 (2000), overruled in part on other grounds in *People v Miller*, 482 Mich 540, 561 n 26 (2008). An abuse of discretion occurs when the decision results in an outcome falling outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617 (2006). De novo review applies to questions of law associated with a new trial ruling. *Kelly v Builder Square, Inc.* 465 Mich 29, 34 (2001).

LEGAL ARGUMENT

I. In this breach of settlement agreement action which arose from the wrongful destruction of property by the Appellants-Defendants, Appellants-Defendants were not entitled to a new trial where Appellees-Plaintiffs' witness Howard Baldwin clearly provided testimony as a lay witness from his own experience producing a film about Gordie Howe.

Appellants-Defendants argue that the testimony of Howard Baldwin was improperly admitted as he did not qualify as an expert and the admission of that testimony was not harmless error as it was the sole evidence of Plaintiffs' damages. This assertion that Mr. Baldwin was the only witness testifying to damages is untrue. The following testimony was given at trial:

1) Del Reddy testified that photographs of Gordie Howe with other sports figures sold anywhere from $100- $300 per photograph; (TT. Vol. II-139);
2) Marty Howe testified that routine photographs of Gordie Howe sold for $100 per photo (TT, Vol. VI, 29, 31, 40);

3) Marty Howe testified that one premium photograph could be released in limited editions of 1000 which would sell for an average of $500 per photograph, which totaled $500,000 in damages (TT. Vol. VI, 27, 34-37);

4) Aaron Howard admitted CDs in their possession, which they destroyed had a memory 700 megabytes (TT. Vol. III, 126);

5) Witness Gatt testified digital photos are typically 2 ½ to 5 megabytes in size (TT. Vol. VI, 96-105)[15];

6) Howard Baldwin testified he paid $75,000 for 1 ½ minutes of video of Gordie Howe he used in the film of Howe but that the value was actually higher as he used a "friends and family discount" (TT. Vol. VII, 58, 87, 91, 100);

7) Howard Baldwin testified he would have reasonably paid $500,000 to $1 million dollars for footage for his own use (TT Vol. VII, 52-87);

8) Mark Howe testified it took PPI 1.5-2 years to recreate business documents and contracts for appearances due to destruction of documents estimating it cost them $240,000[16] per year for a total for a total of $480,000 (TT Vol. V, 71).

Thus, the assertion that Mr. Baldwin was the only witness testifying to damages is false. Both Mark and Marty Howe testified to damages incurred to PPI and for the loss of images based upon past sales data. Thus, it is not axiomatic that the jury simply relied upon Mr. Baldwin's testimony to render its verdict.

Defendants' assert that in pretrial motions they attempted to exclude Mr. Baldwin's testimony entirely and the trial court improperly denied their motion in limine. Defendants

[15] Thus, doing the math on the disc size there were a potential of 140 photos per CD x 402 CDS=56,280 photos destroyed, aside from any still that could be generated from DVDS.
[16] D. Reddy and A. Howard were paid a total yearly compensation of $240,000.

completely ignore the fact that Plaintiffs responded to the motion in limine and asserted that Mr. Baldwin's testimony was not expert testimony, but lay testimony. In reliance on this argument, Plaintiffs cited the following:

1) Defendants knew Howard Baldwin was producing a movie of Gordon Howe and his life and that he wanted to use films and other items in the movie prior to their destruction;
2) Howard Baldwin negotiated a movie deal with the Howes which involved payment of the use of the Howes' likeness, image, etc.;
3) Howard Baldwin would testify he would have paid the Howes more if there had been additional materials available to use in the movie.

Those facts, coupled with testimony from other witnesses that the Defendants' continually filmed the Howe family, that no films or photos were returned as part of the settlement supported the inference that these items existed and were destroyed by Defendants. Based upon that testimony, Mr. Baldwin was able to testify from his direct knowledge of dealing with Defendants and the Howes and actually paying money to the Howes for life rights, what he would have paid if these items had been available. This testimony is not expert testimony, it is testimony that was the direct negotiation of a witness with a party and was relevant and admissible pursuant to MRE 602. (Ex. 11, p. 5-7). Mr. Baldwin executed an affidavit attached to the motion (Ex. 8), outlining his experience with the movie he was making and testifying he would have paid additional consideration if the items were available.

On appeal, Plaintiffs asserted that Mr. Baldwin's testimony was admissible even if he was not qualified as an expert as a lay witness can testify to the value of property. *Grand Rapid v H.R. Terryberry Co*, 122 Mich app 750 (1983); See also Plaintiffs' Brief on Appeal, p. 31). Regardless, even if he were considered an expert, he had the requisite skill, knowledge and experience in the field of movie production to determine what a movie producer would pay for footage of the Howes in negotiating a movie contract and/or life rights to such footage and other materials like

photographs. (See *Muhhollan v DEC Int'l Corp,* 432 Mich 395 (1989) holding that not only was it error to exclude an expert witness because he was not a licensed veterinarian, but that it was also error to exclude his testimony as he was not offered for the purpose of expertise in a particular disease in cows, but rather the relationship between a particular milking defect and the most common dairy herd diseases.)

Mr. Baldwin's testimony was premised upon the facts that were anticipated to be and were presented at trial: that among the items destroyed were films and other depictions of the Howes and the Howe family, a fact which the jury could (and did) infer given not only the testimony of Mark Howe who observed filming by Defendants of the Plaintiffs and the fact that no videos or other films were returned, as well as the fact that significant numbers of CDS, DVDs and tapes were destroyed by Defendants, but also Mike Reddy's admission that the materials were destroyed because they contained images of the Howe family[17].

The Court of Appeals concluded that pursuant to MRE 701 and 602, Mr. Baldwin was testifying as a lay witness, which was the argument that Plaintiffs' proffered in response to Defendants' motion in limine and in their appeal brief. In so concluding, the Court of Appeals noted that Defendants were the only parties referring to Mr. Baldwin as plaintiffs' expert (Ex. 4, p. 9). The testimony by Mr. Baldwin included that he produced films for over 30 years and that he produced a film about Gordie Howe entitled *Mr. Hockey* that was released in Canada in 2013. They had to recreate most of the memorabilia and footage because the Howe family could not supply it. In lieu of obtaining personal footage for Mr. Hockey, he acquired footage from the National Hockey League, about a 1 ½ long, for $75,000. He testified the normal charge was

[17] A reasonable inference that the content of the destroyed material was film of the Howe family is supported by Defendants' continuous filming of Plaintiffs by Defendants, that no films were returned, and that M. Reddy admitted the tapes may have contained such footage.

$150,000 but he obtained a discount. When asked what value he would place on the destroyed property, Mr. Baldwin testified if all 1389 tapes that were destroyed would have been available it would have been worth millions of dollars and incredibly valuable to him. (Ex. 17, p. 50, 53, 57-71, 82, 85-87).

The Court of Appeals correctly noted that Mr. Baldwin's testimony did not rise to the level of expert testimony as he did not provide a valuation figure based upon movie industry standards as a whole and his testimony did not involve principles and methods, but rather what he would have paid based upon his personal experience and knowledge of the matter. Such testimony was properly lay testimony pursuant to MRE 602 and 701. (Ex. 4, p. 10).

Defendants' argument that Mr. Baldwin should have been stricken because he had no relevant expertise in valuation is a red herring. As the Court of Appeals correctly indicated, Mr. Baldwin paid value for his own project- he was certainly able to testify what he did pay and what he would have paid if the destroyed items were available. He does not have to be an expert in valuation to render such testimony. Nevertheless, the Court of Appeals concluded that even if his testimony was properly viewed as expert testimony, the admission was harmless error pursuant to MCR 2.613(A) because his testimony regarding costs associated with film production was based upon his knowledge and experience as a film producer for over 30 years and was so qualified to give an opinion. *Craig v Oakwood Hospital*, 471 Mich 67, 85 (2004). Defendants' argument that Mr. Baldwin is not qualified as an expert in costs associated with film production is almost laughable- who would be better qualified to talk about this than the producer of *Ray*?

Their second argument, that Mr. Baldwin's testimony was not based upon facts in evidence is likewise without merit. While Defendants' quote extensively from depositions of Mr. Baldwin, they fail to address his actual testimony at trial that the 1389 tapes that were destroyed were

incredibly valuable and worth millions of dollars given his payment of $75,000 to the NHL for 1 ½ minutes of footage of Howe. Once again, while Defendants argue this should have been excluded because it lacked foundation pursuant to MRE 702, they ignore the fact that the testimony was based upon Mr. Baldwin's actual knowledge and experience in obtaining the footage, facts that were in evidence and directly relevant to the damage issue.

Defendants' argument that the harmless error rule does not apply if the testimony was properly considered expert testimony is misapplied. The Court of Appeals determined it would have been harmless error if the trial court failed to perform its gatekeeping role because it is apparent from the testimony of Mr. Baldwin he would have qualified as an expert in costs associated with film production given his production of over 30 years as a movie producer and having produced such movies as *Ray*. The harmless error referenced was the gatekeeping function and Defendants cannot establish by any credible argument how Mr. Baldwin would not have qualified as an expert. *See People v Cairnes*, 460 Mich 750, 763-764 (1999)(holding that admission of expert testimony based on a potentially inadmissible foundation qualifies as preserved unconstitutional error and that such error is presumed harmless and the defendant bears the burden of demonstrating that it resulted in a miscarriage of justice); *People v Elston*, 462 Mich 751, 766 (2000)(holding that to overcome the presumption of harmless error, a defendant must persuade the reviewing court that it is more probable than not the error in question was outcome determinative, i.e. that it undermined the reliability of the verdict). Defendants have utterly failed to present any argument Mr. Baldwin was not properly qualified as an expert and thus, any alleged error (if there was one) was harmless as it would not have affected the jury's verdict.[18]

[18] It should be noted the Defendants did not call any witnesses, lay or expert, to testify to damages. The only testimony they proffered was from themselves.

II. Appellants-Defendants waived any argument on appeal that they intended to impeach Howard Baldwin, Appellees-Plaintiffs' witness by failing to make an offer of proof.

Appellants-Defendants contend they were deprived of impeaching Howard Baldwin on cross-examination and were prejudiced because of it. Defendants admittedly failed to make any offer of proof at trial regarding the substance of any alleged impeachment or obtain any ruling excluding such testimony[19] pursuant to MRE 103(a)(2). Because of that failure, Defendants submitted an affidavit by defense counsel that the trial court prevented any use of any prior deposition transcripts by counsel when cross-examining Howard Baldwin. This affidavit is, at best, described as inaccurate and, at worst, described as blatantly false and does not support any argument made by the Defendants that their rights were prejudiced. Defendants never made any attempt to impeach Mr. Baldwin on the record regarding any deposition, never made an offer of proof regarding any alleged questions to impeach Mr. Baldwin, never obtained any ruling from the trial court on the use of the January 24, 2013 or the May 20, 2013 deposition transcripts and have thus not preserved any alleged attempt to impeach Mr. Baldwin for review. The failure to preserve the questioning and/or the ruling on the record thereby waives any claim for error by Defendant in this regard.

[19] The "bench conference" referenced by Defendants lasted approximately one minute where the trial court had an extremely brief sidebar with both Plaintiff and Defense counsel. During this sidebar, *the only issue* raised was whether Defense Counsel could "use" the *de benne esse deposition transcript of May 20, 2013* that the trail court had previously ruled on the record was stricken. Defense counsel has submitted to the trial court an affidavit that states, in part, that the trial court: 1) "ruled that I was not to ask *any cross-examination questions* of the witness based on the *depositions*, because the Court previously ruled that the de benne esse deposition of Howard Baldwin was not to be played"; and 2) "The Court made it clear that I was to ask *no cross-examination questions* of Mr. Baldwin *based on prior inconsistent statements under oath*."[19] Counsel has also stated in his Affidavit (¶17) that while the transcript does not contain the sidebar conference, the video "illustrates" that he intended to impeach Howard Baldwin. The trial court did not make any statement, ruling or otherwise at sidebar that concerned any deposition other than the May 20, 2013 de benne esse deposition of Howard Baldwin, as the trail court merely indicated the deposition could not be used as it had been stricken. The trial court did not make any statement, ruling or otherwise that Defense Counsel could not impeach Mr. Baldwin with prior inconsistent statements. (**Ex. 12,** see attached Ex B, Affidavit of S. Matta and Ex. C, Affidavit of K. Blair). The trial court was never made aware of the January 24, 2013 deposition at sidebar or on the record, nor did the trial court make any statements regarding that deposition whatsoever. Furthermore, the trial court never made any statement or ruling to the parties that Defense Counsel could not cross-examine Mr. Baldwin regarding prior inconsistent statements.

Mason v Chesapeke & O.R. Co, 110 Mich App 76 (1981)[20]; *People v O'Leary*, 6 Mich App 115 (1967)[21]; *Eglash v Detroit Institute of Technology*, 375 Mich 592 (1965).[2223]

Defendants' contended in the brief before the Court of Appeals and in their instant application that *People v Snyder* and *People v Blackston*[24] supports their argument that an offer of proof need not be formally made where the impeachment was apparent from the context of questioning. Defendants' assertion that the "record" includes any pre-trial motions, such as those filed by Defendants to summarily exclude the testimony of Mr. Baldwin was flatly rejected by the Court of Appeals as, once again, it was not apparent what the substantive impeachment would be. Furthermore, Defendants have not cited any authority that supports this argument that pre-trial motions would offer a context from which impeachment could be apparent despite a formal offer of proof.

Unlike in *Snyder* and *Blackston*, Defense counsel's cross-examination of Mr. Baldwin, starting on page 87 of the attached transcript (Ex. 17, TT Vol. VII-p. 87, 100-101) failed to raise any attempt at impeachment. Defense counsel asked the following questions:

> Q. Well, take me through the process of how you determine and come up with a value for – for hockey footage or photos of Gordie Howe?
>
> A. The—I think I've answered this question, Your Honor, but I'm going to do my best to keep answer the same question. We told one segment of Gordie and Mark and Marty's life, which is

[20] Holding there was no error by the trial court where the issue was not preserved by way of offer of proof: "it is not obvious to us what form any testimony concerning prior settlements would have taken…we do not believe the apportionment aspect of this issue is properly preserved for appeal."
[21] Holding failure to preserve issue by failing to make offer of proof or obtaining a ruling on the issue did not warrant reversible error: "at no time did defendant's counsel pursue this questioning with specific identification of witness Knoop as the "tall thin man" nor did he state to the court that such testimony was for the purpose of impeaching within Knoop's prior testimony. No further offer of proof was made."
[22] Holding that any alleged error by court's curtailment of cross-examination was waived by not making a separate record of the testimony."
[23] A complete rendition of the facts and circumstances surrounding this issue is contained in Ex. 12.
[24] It is difficult to understand the reason Blackston was cited by Defendants- this Court held that any error by excluding prior written statements by witnesses was harmless error. Furthermore, in that case, both witnesses that were to be impeached had been previously impeached in the first trial.

> a family coming together, re-united and moving to Houston to play hockey. In the beginning of the movie, there was some flashback footage. At the end of the movie, there was some footage of—of Gordie going on the ice at the Joe Louis. It's about a minute and a half total footage. We didn't have access to other footage in terms of what he might have done in 1996 or—or stuff with the boys, or – we didn't have access to it. But what we have access to we paid $150,000 for, less a discount of family and friends given by the National Hockey League. Those are facts—real facts. There's no denying them.
>
> Q. And I understand what you paid for footage in 1973 season. But what—sir, do you have a deposition in front of you?
>
> A. A what?
>
> Q. A deposition.
>
> A. I'm sorry.
>
> Q. It's a large stack of papers; it should have your name on the front of it.
>
> A. Okay. I've got a – I have exhibit from when I came in there, then--- and---
>
> The Court: Mr. Baldwin, you need to hold on, sir.
> The Witness: Yes, sir.
> The Court: Approach the bench.
> (At 4.42 p.m. bench conference)
> (AT 4:43 p.m., bench conference concluded)
>
> By Mr. Randazzo:
>
> Q. All right, sir. If you could take me through—you can disregard the—the deposition in front of you.

In *Snyder,* counsel's questioning was apparent in his attempts to question the witness at trial - he was attempting to cross the witness regarding whether the victim of defendant had told the witness the shooting was an accident. In questioning, counsel clearly indicated questions as to the nature of the shooting, whether it was an accident and stated to the court that he was attempting to impeach the witness. Nothing whatsoever like that occurred at trial in this matter, as the record clearly demonstrates. Defendant never attempted to make any record or obtain any ruling from

the trial court whatsoever. Furthermore, Defense counsel never made any attempt to state a substantive question regarding impeachment, like in *Snyder*. While Defendants now contend that the impeachment was apparent from their previously filed pre-trial motions, even if this were sufficient to qualify as an offer of proof, which Appellees-Plaintiffs dispute, Defendants never referenced the previously filed motions in the trial court, or that they even intended to impeach Mr. Baldwin. Additionally, the May 20, 2013 deposition was stricken from the record at Defendants' request. Despite this and the fact that this was not the only deposition of Mr. Baldwin, Defendants' counsel made no attempt to create a record with regard to either deposition or to indicate that it otherwise objected to any alleged ruling by the trial court regarding the May 20, 2013 de benne esse deposition.

Defendants spend an inordinate amount of time citing cases that support their right to cross-examination and the right to impeach a witness. What the Defendants' fail to address however, is any case that supports their contention that a previously filed pre-trial motion is sufficient to form a basis for a trial court and reviewing court to conclude the context of impeachment questions. Defendants' simply failed to address the issue at trial. Defendants could have indicated an intent to impeach on the record, requested the jury be excused and then made the requisite record from which this Court could review. Their failure to do so waives any argument on appeal as the trial court and this Court cannot be asked to speculate as to what substantive questions Defendants' counsel intended to ask. That is the very reason for MRE 103. There is no indication from the trial record of a question from which impeachment would have been proper, pending before the trial court. As in *People v O'Leary*, Defendants' counsel failed to even state on the record his attempt to impeach and has utterly waived any issue regarding impeachment.

Plaintiffs' cite two cases from Indiana and Florida, *Poore* and *Deada.* Not only are these

cases not precedentially binding, they are inapplicable to the facts in the instant case. In both *Poore* and *Daeda*, counsel for defendant clearly indicated in questioning that he was intending to introduce prior inconsistent statements and in *Deada*, argued that he was offering statements for purposes of impeachment. Critically, unlike in *Poore* and *Daeda*, there was no action or statement from counsel in this action whatsoever that indicated an attempt to impeach Mr. Baldwin.

Furthermore, the Court of Appeals held that even if the issue had been preserved, any alleged error in preventing the use of the deposition to impeach Mr. Baldwin was harmless given that Defendants' have asserted they wished to impeach Mr. Baldwin regarding the value of the property and that Mr. Baldwin's testimony was an estimate of damages, not a sum certain.

Thus, there is no prejudice to Defendants regarding this isuse, given that they failed to preserve the issue and even if there were an alleged error, it was harmless error.

III. The trial court's order denying Appellants-Defendants' motion for directed verdict was correct where the Appellees-Plaintiffs' claims for attorneys fees and costs were submitted in a post-judgment motion pursuant to the terms of a settlement agreement that provided that attorney's fees and costs would be available to the prevailing party in any proceeding to enforce the agreement.

Under the American rule, attorneys fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract. *Reed v Reed*, 265 Mich App 131, 164 (2005). A contractual clause providing that in the event of a dispute the prevailing party is entitled to recover attorneys fees is valid. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co.*, 274 Mich App 584, 589 (2007). When a contract specifies that a breaching party is required to pay the other side's attorney fees, the Court must determine the reasonable attorney's fees to be awarded. *Papo v Aglo Restaurants of San Jose, Inc.*, 149 Mich App 285, 299 (1986).

Defendants rely upon the unpublished decision of *T-Craft* for the proposition that evidence of the reasonableness of the attorney's fees have to be introduced at trial, not in a post judgment motion. An unpublished opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). Presumably, this is because the unpublished decision may not lend itself amendable to a general pronouncement of the holding. *T-Craft* gives only a very cursory treatment of this issue (2 paragraphs) and fails to cite the exact language of the contract that gave rise to the claim. Additionally, while *T-Craft* cites *Fleet Business Credit, LLC v Krapohl Lincoln Mercury Co*, 274 Mich App 584, 588 (2007), a published case, Fleet *did not* hold that attorney's fees and costs recoverable pursuant to a contractual provision must be handled in the case in chief as opposed to a post-judgment motion. Rather, it held that as general damages it was not necessary to specifically plead such damages in a complaint[25].

Likewise, reliance on *Zeeland Farm Servs v JBL Enters*[26], 219 Mich App 190 (1996) is not factually akin to the instant case as it involved a situation where the reasonableness of the attorney's fees was at issue, but the attorneys fees had been incurred before the action was filed and the plaintiff was attempting to collect attorneys fees as part of its claim. Therefore, the plaintiff in *Zeeland* was required to introduce evidence of the reasonableness of the attorney fees to avoid a directed verdict.

In the instant matter, the settlement agreement explicitly states a party was not entitled to recover attorney's fees until they prevailed in the action to enforce the agreement:

> The prevailing party in any proceeding to enforce this agreement, or any remedy contemplated by this Agreement, shall be entitled to recover, in addition to any other remedy, actual costs and attorney fees incurred in the enforcement.

[25] Pursuant to MCR 7.215(C)(1), Defendants should not be citing *T-Craft* as there exists published authority on this issue of attorneys fees, namely *Fleet Business* and *Zeeland*.

[26] Likewise, *Zeeland*'s reliance on *In re Howarth Estate*, 108 Mich. App. 8, 12; 310 N.W.2d 255 (1981) is not applicable as it concerned a costs of collection provision and was remanded for an evidentiary hearing on the issue.

Additionally, the Defendants also made a counter-claim for their attorney's fees and costs in the case. Defendants did not introduce any proofs of the reasonableness of their attorney fees at trial. Therefore, it was clear to both parties, the trial court, and the Court of Appeals that once a prevailing party had been determined, the court would ascertain the reasonableness of those fees in a post judgment motion. Therefore, there is no error by the trial court in conducting a post judgment hearing regarding the reasonableness of the attorneys fees and no need for review in this matter.

Defendants also cite *Pransky v Falcon Group, Inc.*, 311 Mich App 164, 194, 195 (2015) which held defendant was precluded from recovering its attorney fee pursuant to a contractual provision as the party failed to plead a counter-claim for the attorney's fees. However, this case is clearly distinguishable from the instant case. Plaintiff properly plead their attorney's fees and costs in their complaint and the Court of Appeals recognized this in its decision at page 13. (Ex. 4). Thus, both parties anticipated all along that the attorney's fees issued would be handled in a post- judgment motion. *Pransky* only stands for the concept that a trial court may not enter judgment on a claim that was not *brought* in the original action. There was no question that in the instant case the attorney fee claims were brought by both Plaintiffs and Defendants and it was no shock to either party that once a verdict was rendered and in accordance with the provision of the contracted parties' agreement, that the attorney's fees issue would be handled post-judgment once a prevailing party had been determined and attorneys fees incurred. Therefore, there is no error to be remedied and the judgment for Plaintiffs should be affirmed.

IV. This case is not appropriate for review by this Court.

MCR 7.305(B) mandates that Appellants establish a ground for this Court's review in the application, such as:

> (3) the issue involves legal principles of major significance to the state's jurisprudence;
> * * * * * *
> (5) in an appeal from a decision of the Court of Appeals,
>
> > (a) the decision is clearly erroneous and will cause material injustice or
> >
> > (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals …

Not one of those grounds is present here.

While of obvious interest to the parties, the issues of whether testimony was properly admitted, whether defendants' failure to make an offer of proof waived any right to review on appeal and whether attorneys fees are recoverable post judgment are not ones involving legal principles of major significance to the state's jurisprudence. There is ample precedent justifying the lower appellate court's decision, and simply denying leave to appeal would leave the laws of Michigan as they presently stand.

Nor does the decision of the Court of Appeals conflict with any prior decision by this Court or by the Court of Appeals. As explained above, imposing the obligations asserted by Appellants-Defendants (guessing as to what issues are to be reviewed on appeal, setting aside jury verdicts based upon valid testimony and relying on unpublished decisions to set aside an award of attorney fees) would conflict with the existing precedent and would render jury verdicts susceptible to being overturned, even after at most harmless error was committed.

Finally, the Court of Appeals decision was not clearly erroneous and will not cause material injustice. When Appellants-Defendants went to trial, they knew the attorneys fees issue was going to be handled post judgment, they did not submit proofs of their own claim, they failed to make, time and again, adequate record in the trial court, and now want this Court to remedy the Defendants' errors. The issues Defendants raise resulted solely from their approach to trying this

case and their failure to make adequate records of these issues. To now impose these after-the-fact, far-reaching and heretofore unrecognized duties on the trial court and the Court of Appeals in its review process would constitute the material injustice, and not vice-versa.

STATEMENT OF RELIEF SOUGHT

Plaintiffs respectfully request this Supreme Court deny leave to appeal and/or to summarily affirm the decision of the Court of Appeals.

Respectfully submitted,

MATTA BLAIR, PLC

By: /s/ Kellie M. Blair (P58642)

KELLIE M. BLAIR (P58642)
Attorney for Plaintiffs/Appellees
39572 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304
(248) 593-6100/593-6116 Fax
kblair@mattablair.com

Dated: September 26, 2016

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Julie A. Hoban, being first duly sworn, deposes and states that she is employed with the law firm of Matta Blair, PLC, and that on September 26, 2016, she served copies of:

APPELLEES, POWER PLAY INTERNATIONAL, INC.
AND GORDON HOWE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

and this PROOF OF SERVICE

upon all counsel of record via E-FILING.

/s/ Julie A. Hoban
Julie A. Hoban